TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 849

ELMIRA NICHOLS AND PAULINE THOMPSON,
APPELLANTS,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT OF WORCESTER COUNTY,
MASSACHUSETTS

FILED APRIL 6, 1939.

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INDEX.

	Original	Print
Record from Superior Court of Worcester County	1	1
Citation and service (omitted in printing)	1	
Petition for appeal, assignments of error and prayer for reversal	3	1
Order allowing appeal and fixing bond	27	3
Bond on appeal (omitted in printing)	30	
Praecipe for transcript of record	35	4
Substitute bill of exceptions	43	6
Exhibit "A"—Handbill	47	8
Complaint against Elmira Nichols in Central District Court of Worcester	49	8
Judgment in Central District Court of Worcester (Elmira Nichols)	50	9
Motion of Elmira Nichols to quash and dismiss	52	10
Notice of waiver of jury trial (Elmira Nichols)	54	11
Finding of guilty of Elmira Nichols	55	12
Order granting stay of execution of sentence of Elmira Nichols	56	12
Complaint against Pauline Thompson in Central District Court of Worcester	57	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1939.

	Original	Print
Record from Superior Court of Worcester County—Continued.		
Judgment in Central District Court of Worcester (Pauline Thompson)	58	13
Motion of Pauline Thompson to quash and dismiss	61	14
Notice of waiver of jury trial (Pauline Thompson)	63	15
Finding of guilty of Pauline Thompson	64	16
Order granting stay of execution of sentence of Pauline Thompson	65	16
Defendant's motion to consolidate	66	16
Docket entries (Elmira Nichols)	67	17
Docket entries (Pauline Thompson)	68	18
Rescript of Supreme Judicial Court in case of Elmira Nichols	69	20
Rescript of Supreme Judicial Court in case of Pauline Thompson	70	20
Opinion, Qua, J., Supreme Judicial Court	71	21
Certificate of clerk (omitted in printing)	78	
Certificate of Burns, J., as to clerk's authority (omitted in printing)	80	
Certificate of clerk of courts as to judge's authority (omitted in printing)	81	
Statement of points to be relied upon and designation as to printing record	82	25

[fols. 1-2] Citation in usual form showing service on Charles S. Barton, filed March 2, 1939, omitted in printing.

[fol. 3] **SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938**

ELMIRA NICHOLS, Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS

PAULINE THOMPSON, Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed March 2, 1939

PETITION FOR APPEAL

Considering themselves aggrieved by the judgment of conviction and sentence entered by the Superior Court for Worcester County of the Commonwealth of Massachusetts on May 23, 1938, which now stands affirmed by virtue of the overruling of their exceptions by the Supreme Judicial Court of said Commonwealth on December 21, 1938, and the rescript thereafter filed by it with the Clerk of the Superior Court of Worcester County on December 27, 1938, which operated to make said judgment of said Superior Court a final judgment, the appellants herein, Elmira Nichols and Pauline Thompson, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for [fol. 4] an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said Elmira Nichols and Pauline Thompson assign the following errors in the Record and proceeding in said case:

1. That the court below erred in failing or refusing to allow the appellants' motion to quash and dismiss the complaint and the proceedings thereunder which motion to

quash and dismiss was based upon the grounds that the ordinance of the City of Worcester upon which the complaint was based was void and unconstitutional on its face and, therefore, unenforceable; and that the freedom of the press guaranteed by the Fourteenth Amendment of the United States Constitution extends to every sort of publication which affords a vehicle of information and opinion and that the said ordinance prohibiting the distribution of literature strikes at the very foundation of and abridges the freedom of the press and therefore is unconstitutional and invalid under the doctrine as most recently set forth in the case of Lovell vs. The City of Griffin, 303 U. S. 444.

2. That the court below erred in holding that the ordinance of the city of Worcester excluding the public streets and ways from the places available for free distribution of printed matter is not a violation of section 1 of the Four-
[fol. 5] teenth Amendment of the United States Constitution and the freedom of the press guaranteed therein.

3. That the Court below erred in holding that the ordinance of the city of Worcester did not prohibit the sale of literature on the streets or ways of the city but did prohibit free distribution of the same literature on the streets or ways of said city, thus having as its object the prevention of the accumulation of litter and did not, therefore, violate section 1 of the Fourteenth Amendment of the United States Constitution and the freedom of the press guaranteed therein.

4. That the court below erred in holding that a city ordinance which restricted free distribution of literature on the streets or ways of a city and which as construed did not prohibit the sale of the same or other literature on said streets or ways of the city was a valid exercise of the police power even though both sale and free dissemination of literature would cause litter, if any, to the same extent and a prohibition of either would result in the violation of section 1 of the Fourteenth Amendment of the United States Constitution as it relates to freedom of the press.

Prayer for Reversal

Wherefore, on account of the errors hereinbefore as-
signed, petitioners pray that the said judgment of the Su-
[fols. 6-26] perior Court of the Commonwealth of Massa-

chusetts for the County of Worcester dated May 23, 1938, and which was affirmed by the Supreme Judicial Court of Massachusetts by its decision dated December 21, 1938 and the rescript thereafter filed by it with the Clerk of said Superior Court on December 27, 1938, in the above entitled cause be reversed and judgment entered in favor of these appellants.

Osmond K. Fraenkel, Sidney S. Grant, Samuel E. Angoff, Attorneys for Appellants.

Date, Feb. 28, 1939.

[File endorsement omitted.]

[fol. 27] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING BOND—Filed March 2, 1939

The petition of Elmira Nichols and Pauline Thompson, the appellants in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Superior Court for the County of Worcester of the Commonwealth of Massachusetts, having been filed with the Clerk of this court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record of this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the judgment of the Superior Court of the Commonwealth of Massachusetts for Worcester County dated May 23, 1938, which was [fol. 28] affirmed by the decision of the Supreme Judicial Court of said Commonwealth on December 21, 1938, overruling the appellants' exceptions and the rescript thereafter filed by said Court with the Clerk of said Superior Court on December 27, 1938 which operated to make said judgment a final judgment, as prayed in said petition, and that the Clerk of the Superior Court of the County of Worcester of the Commonwealth of Massachusetts shall within

forty (40) days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said Court a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that security for costs on appeal be fixed in the sum of Two Hundred and Fifty Dollars for which sum a bond with surety is to be filed by the appellants and that said appellants until further order of the Court remain at large upon the bail heretofore furnished.

John P. Higgins, Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

Date, Feb. 28, 1939.

[fol. 29] [File endorsement omitted.]

[fols. 30-34] Bond on appeal for $250.00, approved and filed March 2, 1939, omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 2, 1939

To the Clerk of the Superior Court of the Commonwealth of Massachusetts for the County of Worcester, Greeting:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to appeal duly allowed in the above entitled cause and to include in such transcript of record the following to wit:

1. All of the record of the cases docketed in the Superior Court, Criminal Session, for the County of Worcester, numbered 405 and 407, as contained in the defendants' [fol. 36] exceptions consolidating both cases and prepared by this court for the Supreme Judicial Court and being numbered 602-603.

2. All docket entries entered since the printing of the record set forth in paragraph 1.

3. A copy of the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

4. A copy of the rescripts filed with this court by the Supreme Judicial Court of the Commonwealth of Massachusetts.

5. And judgments of the Superior Court for the County of Worcester not contained in the record requested in paragraph 1.

6. The appellants' petition for appeal to the Supreme Court of the United States and their assignment of errors and prayer for reversal.

7. The order allowing appeal and fixing bond.

8. The statement as to jurisdiction.

9. The citation.

10. The bond.

11. Statement Directing Attention to Rule 12 and Proof of Service.

12. This præcipe.

Said transcript to be prepared as required by law and by the rules of the Superior Court of the Commonwealth of [fols. 37-42] Massachusetts, the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. on or before the return date of the citation.

Osmond K. Fraenkel, Sidney S. Grant, Samuel E. Angoff, Counsel for Appellants.

Dated, March 2, 1939.

Service acknowledged this second day of March, 1939.

Charles S. Barton, Assistant District Attorney, 58 Cedar Street, Worcester, Mass.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF WORCESTER COUNTY, COMMONWEALTH OF MASSACHUSETTS

Criminal

COMMONWEALTH

vs.

PAULINE THOMPSON and ELMIRA NICHOLS

SUBSTITUTE BILL OF EXCEPTIONS—Filed July 13, 1938

This is a criminal action brought against the defendants, Pauline Thompson and Elmira Nichols, for violation of an ordinance of the City of Worcester. All the facts and evidence material to the questions involved are herein contained, although the pleadings may be referred to and are made part of this Bill of Exceptions.

This case was submitted to the Superior Court without Jury, the Defendants having waived their right to a Jury trial, the facts being substantially as follows:

"The defendants on the day alleged in the complaint on a public street near Wheaton Square in the City of Worcester distributed leaflets, one of which is hereto annexed and marked Exhibit "A".

The defendants distributed a large number of these leaflets to people entering, leaving or passing by the [fol. 44] Armory, a public building in said square, while they were on said public way in said City of Worcester. The distribution was made in an orderly and peaceful manner, and the defendants did not in any way themselves throw any of the leaflets on the sidewalk or scatter them around. Some of the people to whom these leaflets were handed by the defendants, while the defendants were still distributing the leaflets, did throw them aside on the public sidewalk and on the public street, and there were approximately fifteen of these leaflets lying around on the public sidewalk and approximately fifteen lying around on the public street. The arresting officer testified that the dropping of the leaflets on the sidewalk and way caused litter thereon.

The defendants were then arrested by an officer of the City of Worcester and charged with violation of that portion of Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester which relates to the care of streets.

Chapter 36 of the Revised Ordinances of the City of Worcester is headed "Streets" and relates to the control and care of the public ways, streets and sidewalks in the City of Worcester. Section 12 reads as follows:

'No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same [fol. 45] from being blown or scattered about in the streets.'

In the Central District Court of Worcester, for Criminal Business, the defendants moved to dismiss on the grounds that the ordinance is contrary to the Constitution of the United States, Fourteenth Amendment, and void on its face.

The trial Justice denied the motion and found the defendants guilty and fined the defendants Five Dollars ($5.00) each. The defendants thereupon appealed to the Superior Court for Worcester County."

At the beginning of the case, before evidence was introduced, the defendants duly moved to quash and dismiss on the ground that the complaint did not allege a crime; that the ordinance was unconstitutional and void on its face; and, that the ordinance violated the freedom of the press guaranteed by the First Amendment of said Constitution of the United States, by the Fourteenth Amendment of said Constitution and by the Constitution of the Commonwealth of Massachusetts. The trial Justice of the Superior Court denied the motion to quash and dismiss, to which ruling the defendants, being aggrieved, thereby duly except and pray that their exceptions be allowed. The trial Justice of the Superior Court after hearing the evidence, found the defendants guilty.

By Their Attorneys, Grant & Angoff.

[fol. 46] [File endorsement omitted.]

Exceptions Allowed July 15, 1938.
William A. Burns, Justice of the Superior Court.

[fol. 47] EXHIBIT "A"

Protest Meeting

Saturday, Apr. 16—2 P. M.

Worcester Common

Speakers:

A. Frank Reel

well known Boston Labor Lawyer

Daniel Murray

President Worcester Industrial Union Council

Ernest B. Sykes

President Whittall Group of Local 15 TWOC

Unemployment Insurance. Are you getting your check on time? We paid the money when we worked. We demand it when we need it. Make Gov. Hurley remove his incompetent friends from the Insurance Commission and put qualified Civil Service Servents in their place.

Welfare and Relief. What are we going to do when our unemployment insurance runs out? It is the duty of Government to provide jobs or relief. There must be No Starvation in Worcester. Increase the WPA.

Wage Cuts. Worcester employers are cutting wages and trying to blame the Depression on Roosevelt. Low Wages mean less purchasing power, means a worse depression. [fol. 48] Stop Wage Cuts in Worcester.

Worcester Industrial Union Council,

26 Trumbull Street.

[fol. 49] IN CENTRAL DISTRICT COURT OF WORCESTER

COMMONWEALTH OF MASSACHUSETTS

COMPLAINT

To the Central District Court of Worcester, in the County of Worcester, and Commonwealth of Massachusetts:

Robert T. Hardy of Worcester, in said County, in behalf of said Commonwealth, on oath complains that El-

mira Nichols of said Holden on the fourteenth day of April in the year nineteen hundred and thirty-eight at Worcester, in said County, did upon a certain street, to wit: Wheaton Sq-are, distribute handbills, flyers, advertisements or papers.

[On left margin:] vio. city ord.

Chap. 36 sec. 12 as amended.

off. Louwrey Miller.

And he prays that the said Defendant be arrested and held to answer to this complaint and further dealt with relative thereto, according to law, and that the Complainant and Deft.—5 Hawthorne Rd. Holden—be summoned, to testify what they know relative to the subject matter thereof, before said Court.

Robert T. Hardy, Complainant.

WORCESTER, ss:

Received and sworn to this fourteenth day of April in the year of our Lord one thousand nine hundred and [fol. 50] thirty-eight before said Court.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

(Reverse Side of Complaint:)

13 [405]*

No. 1878 1938

Com. vs. Elmira Nichols
on complaint of Robert T. Hardy
for Vio. City Ord.
Rec'd fourteenth April 1938
Complaint,
Central District Court of Worcester,
Commonwealth of Massachusetts

JUDGMENT

WORCESTER, ss:

On this complaint the Defendant is before the Central District Court of Worcester in the County of Worcester,

[* Figures enclosed in brackets erased in copy.]

on the twenty-first day of April A. D. 1938 and said com-
[fol. 51] plaint is read to him/her and she says that thereof she is not guilty after hearing all matters and things concerning the same it is adjudged by the said District Court that said Defendant is guilty.

It is thereupon ordered by the said District Court that the said Defendant pay a fine of $5.00 and in default thereof that he stand committed to either of the Houses of Correction in said County, till the same be paid or said Defendant be otherwise discharged in due course of law.

From this order the Defendant was notified of her right to appeal.

From this decision said Defendant appeals, and is thereupon ordered to recognize with sureties in the sum of $50 for his/her personal appearance before the Superior Court, next to be holden at Worcester, within and for said County, on first Monday of May next for the transaction of criminal business, then and there to prosecute said appeal according to law, and in default thereof that he stand committed to Jail in said County till said Defendant enters into such recognizance or said Defendant be otherwise discharged in due course of law. With this order said Defendant complies, personal recognizance.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

[fol. 52] In Superior Court of Worcester County

Commonwealth

vs.

Elmira Nichols

Defendant's Motion to Quash and Dismiss—Filed May 23, 1938

Now comes the defendant and moves that the above named complaint be quashed and dismissed as to her and assigns therefor the following reasons:

First. That the complainant neither in form nor substance charges any crime to have been committed by the said defendant.

Second. That this ordinance of the City of Worcester, being void and unconstitutional on its face is, therefore, unenforceable against this defendant.

Alma Lovell, appellant vs. The City of Griffin, United States Supreme Court, March 28, 1938, Chief Justice Hughes.

Third. That the freedom of the press guaranteed by the first amendment to the Constitution of the United States, by the Fourteenth Amendment of said Constitution and [fol. 53] by the Constitution of the Commonwealth of Massachusetts, extends to every sort of publication which affords a vehicle of information and opinion. That to prohibit the distribution of literature strikes at the very foundation of the freedom of the press; that the ordinance of the City of Worcester, under which the defendant in being prosecuted, contravenes these basic mandates, in that the said ordinance abridges the freedom of the press. Wherefore, the said ordinance is unconstitutional and invalid.

Alma Lovell, Appellant, vs. The City of Griffin, supra.

By Her Attorneys, Grant & Angoff.

May 23, 1938. Filed & denied & Exception saved. (Burns, J.) Attest: Philip S. Smith, Ass't Clerk.

[fol. 54] In Superior Court of Worcester County

Comm., Plff.

Elmira Nicholas, Deft.

Notice of Waiver of Jury Trial—Filed May 23, 1938

In the above entitled action the defendant gives notice that she desires to waive her right to a trial by jury.

Elmira Nichols.

Witness: Sidney S. Grant.

[File endorsement omitted.]

[fol. 55] IN SUPERIOR COURT OF WORCESTER COUNTY

FINDING OF GUILTY—May 23, 1938

In the Action, COMMONWEALTH against ELMIRA NICHOLAS

The Court finds the Defendant Guilty.

William A. Burns, Justice of the Superior Court.

[fol. 56] IN SUPERIOR COURT OF WORCESTER COUNTY

No. 405

COMMONWEALTH

vs.

ELMIRA NICHOLS

ORDER GRANTING STAY OF EXECUTION OF SENTENCE—Filed May 23, 1938

I hereby certify that in my opinion there is reasonable doubt whether the judgment should stand, and a stay of execution of sentence is hereby granted.

William A. Burns, Presiding Justice.

May 23rd, 1938.

[File endorsement omitted.]

[fol. 57] IN CENTRAL DISTRICT COURT OF WORCESTER

COMMONWEALTH OF MASSACHUSETTS

COMPLAINT

To the Central District Court of Worcester, in the County of Worcester, and Commonwealth of Massachusetts:

Robert T. Hardy of Worcester, in said County, in behalf of said Commonwealth, on oath complains that Pauline Thompson of said Worcester, on the fourteenth day of April in the year nineteen hundred and thirty-eight at Worcester, in said County, did upon a certain street, to wit;

Wheaton Square, distribute handbills, flyers, posters, advertisements or papers

[On left margin:] Vio city Ord.

Chap. 36 Sec. 12 as amended.

off. Lowrey Miller.

And he prays that the said Defendant be arrested and held to answer to this complaint and further dealt with relative thereto, according to law, and that the Complainant and Deft.—5 Hawthorne Rd. Holden—be summoned, to testify what they know relative to the subject matter thereof, before said Court.

Robert T. Hardy, Complainant.

WORCESTER, ss:

Received and sworn to this fourteenth day of April in the year of our Lord one thousand nine hundred and thirty-
[fol. 58] eight before said Court.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

(Reverse Side of Complaint:)

14 [407]*

No. 1877 1938

Com. vs. Pauline Thompson
on complaint of Robert T. Hardy
for Pas. out handbills
Vio City ord.
Rec'd fourteenth April 1938
Complaint,
Central District Court of Worcester,
Commonwealth of Massachusetts

JUDGMENT

WORCESTER, ss:

On this complaint the Defendant is before the Central Dis-
[fol. 59] trict Court of Worcester in the County of Worcester,

[* Figures enclosed in brackets erased in copy.]

on the twenty-first day of April A. D. 1938 and said complaint is read to her and she says that thereof she is not guilty but after hearing all matters and things concerning the same it is adjudged by the said District Court that said Defendant is guilty.

It is thereupon ordered by the said District Court that the said Defendant pay a fine of $5.00 and in default thereof that he stand committed to either of the Houses of Correction in said County, till the same be paid or said Defendant be otherwise discharged in due course of law.

From this order the Defendant was notified of his/her right to appeal.

From this decision said Defendant appeals, and is thereupon ordered to recognize with sureties in the sum of $50 for her personal appearance before the Superior Court, next to be holden at Worcester, within and for said County, on first Monday of May next for the transaction of criminal business, then and there to prosecute said appeal according to law, and in default thereof that he stand committed to Jail in said County till said Defendant enters into such recognizance or said Defendant be otherwise discharged in due course of law. With this order said Defendant complies, personal recognizance.

[fol. 60] Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

[fol. 61] In Superior Court of Worcester County

Commonwealth

vs.

Pauline Thompson

Defendant's Motion to Quash and Dismiss—Filed May 23, 1938

Now comes the defendant and moves that the above named complaint be quashed and dismissed as to her and assigns therefor the following reasons:

First. That the complaint neither in form nor substance charges any crime to have been committed by the said defendant.

Second. That this ordinance of the City of Worcester, ter, being void and unconstitutional on its face is, therefore, unenforceable against this defendant.

Alma Lovell, Appellant vs. The City of Griffin, United States Supreme Court, March 28, 1938, Chief Justice Hughes.

Third. That the freedom of the press guaranteed by the first amendment to the Constitution of the United States; by the Fourteenth Amendment of said Constitution and by the Constitution of the Commonwealth of Massachusetts, [fol. 62] extends to every sort of publication which affords a vehicle of information and opinion. That to prohibit the distribution of literature strikes at the very foundation of the freedom of the press; that the ordinance of the City of Worcester, under which the defendant is being prosecuted, contravenes these basic mandates, in that the said ordinance abridges the freecom of the press. Wherefore, the said ordinance is unconstitutional and invalid.

By Her Attorneys, Grant & Angoff.

May 23, 1938. Filed & denied & exception saved. (Burns, J.) Attest: Philip S. Smith, Ass't Clerk.

[fol. 63] In Superior Court of Worcester County

Comm., Plff.,

—

Pauline Thompson, Deft.

Notice of Waiver of Jury Trial—Filed May 23, 1938

In the above entitled action the defendant gives notice that she desires to waive her right to a Trial by Jury.

Pauline Thompson.

Witness: Sidney S. Grant.

[File endorsement omitted.]

[fol. 64] In Superior Court of Worcester County

Finding of Guilty—May 23, 1938

In the Action, Commonwealth against Pauline Thompson

The Court finds the Defendant Guilty.

William A. Burns, Justice of the Superior Court.

[fol. 65] In Superior Court of Worcester County

No. 407

Commonwealth

vs.

Pauline Thompson

Order Granting Stay of Execution of Sentence—Filed May 23, 1938

I hereby certify that in my opinion there is reasonable doubt whether the judgment should stand, and a stay of execution of sentence is hereby granted.

William A. Burns, Presiding Justice.

May 23rd, 1938.

[File endorsement omitted.]

[fol. 66] In Superior Court of Worcester County

Commonwealth

vs.

Pauline Thompson

Motion to Consolidate—Filed July 13, 1938

Now comes the defendant in the above entitled action and moves that her case be consolidated with the case of Commonwealth vs. Elmira Nichols, now pending on Exceptions, on the ground that the crime alleged in both cases

was committed jointly and arises out of the same circumstances.

By Her Attorneys, Grant & Angoff.

July 13, 1938.

I hereby assent to the allowance of this motion.

Alfred B. Cenedella, Ass't Dist. Atty.

[File endorsement omitted.]

Allowed.

William A. Burns, J. S. C.

July 15/38.

[fol. 67] In Superior Court of Worcester County

No. 13

May '38—405

Worcester

Vio. City Ord.

Docket Entries

Commonwealth of Massachusetts

vs.

Elmira Nichols, Appt.

Counsel for Comth.: Owen A. Hoban, Dist. Atty.; Alfred B. Cenedella, Ass't Dist. Atty.
Counsel for Deft.: Sidney S. Grant, 89 State St., Boston.

May 23/38. Deft's. mo. to quash & dismiss filed & denied & exception saved (Burns, J.).
Deft's. waiver to right of trial by jury filed.
Finding of "Guilty" by Court after hearing (Burns, J.).
Sentence, Fine $5.
Stay of exon. of sentence granted.
Recogs. personally.
May 26/38. Deft's. Bill of Exceptions filed.
July 13/38. Substitute Bill of Exceptions filed.
July 15/38. Exceptions allowed (Burns, J.).

Dec. 27/38. Rescript received & filed, viz: "Exceptions overruled."

Mar. 2/39. Pet. for appeal to Supreme Court of the U. S., assignment of errors & prayer for reversal filed.

Appellant's statement disclosing basis of jurisdiction (including opinion) to Supreme Court of U. S., filed.

Order of John P. Higgins, Chief Justice of Superior Court, allowing appeal & fixing bond filed.

Bond filed.

Citation to appellee filed.

Statement directing attention to Rule 12, Sup. Ct. of U. S., & proof of service filed.

Praecipe of appellant for transcript of record filed.

Mar. 17/39. Appellee's statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of U. S. & motion to dismiss filed.

Vio.	Violation
Ord.	Ordinance
Deft's.	Defendant's
Mo.	Motion
J.	Justice
Exon.	Execution
Recogs.	Recognizes
Pet.	Petition

[fol. 68] In Superior Court of Worcester County

No. 14

May '38—407

Worcester

Vio. City Ord.

Docket Entries

Commonwealth of Massachusetts

vs.

Pauline Thompson, Appt.

Counsel for Comth.: Owen A. Hoban, Dist. Atty.; Alfred B. Cenedella, Ass't Dist. Atty.

Counsel for Deft.: Sidney S. Grant, 89 State St., Boston.

May 23/38. Deft's. mo. to quash & dismiss filed & denied & exception saved. (Burns, J.)

Deft's. waiver to right of trial by jury filed.
Finding of "Guilty" by Court after hearing (Burns, J.).
Sentence, Fine $5.
Stay of exon. of sentence granted.
Recogs. personally.
May 26/38. Deft's. Bill of Exceptions filed.
July 13/38. Mo. to consolidate with (#405) #13 filed.
Substitute Bill of Exceptions filed.
July 15/38. Exceptions allowed (Burns, J.).
Mo. to consolidate with (#405) #13 allowed.
Dec. 27/38. Rescript received & filed, viz: "Exceptions overruled."
Mar. 2/39. Pet. for appeal to Supreme Court of the U. S., assignment of errors & prayer for reversal filed.
Appellant's statement disclosing basis of jurisdiction (including opinion) to Supreme Court of U. S., filed.
Order of John P. Higgins, Chief Justice of Superior Ct. allowing appeal & fixing bond filed.
Bond filed.
Citation to appellee filed.
Statement directing attention to Rule 12, Sup. Ct. of U. S., & proof of service filed.
Praecipe of appellant for transcript of record filed.
Mar. 17/39. Appellee's statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of U. S. & motion to dismiss filed.

Vio.	Violation
Ord.	Ordinance
Deft's.	Defendant's
Mo.	Motion
J.	Justice
Exon.	Execution
Recogs.	Recognizes
Pet.	Petition

[fol. 69] In Supreme Judicial Court of Massachusetts

Rescript—December 21, 1938

In the Case of

Commonwealth

vs.

Elmira Nichols

pending in the Superior Court for the County of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:

Exceptions overruled.

By the Court, Walter F. Frederick, Clerk.

December 21, 1938.

Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

Filed Dec. 27, 1938. Attest, William C. Bowen, Clerk.

[fol. 70] In Supreme Judicial Court of Massachusetts

Rescript—December 21, 1938

In the Case of

Commonwealth

vs.

Pauline Thompson

pending in the Superior Court for the County of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:

Exceptions overruled.

By the Court, Walter F. Frederick, Clerk.

December 21, 1938.

Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

Filed Dec. 27, 1938. Attest, William C. Bowen, Clerk.

[fol. 71] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

QUA, J.

Each defendant has been convicted and fined $5 for violation of c. 36, § 12, of the Revised Ordinances of the city of Worcester, which reads as follows: "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

At the beginning of the trial, before any evidence was introduced, each defendant moved "to quash and dismiss" the complaint against her on the ground that it did not charge the commission of any crime and that the ordinance was unconstitutional and void. In each case the only exception is to the denial of the motion. In each case the only point raised and argued is that the ordinance is void on its face in that it interferes with the freedom of the press as guaranteed by § 1 of the Fourteenth Amendment to the Constitution of the United States and by art. 16 of the Bill of Rights of the Constitution of this Commonwealth. We confine our discussion to this point, and we assume in accordance with the trend of recent decisions that freedom of the press is a "liberty" protected by the due process clause of the Fourteenth Amendment against interference by State law; that, for present purposes, a duly authorized city ordinance is a State law; and that liberty of the press extends to the kinds of printed matter to which the ordinance refers and includes distribution as well as publication. Lovell v. Griffin, 303 U. S. 444, 450, 452, and cases cited.

In the recent case of Commonwealth v. Kimball, Mass. [fol. 72] Adv. Sh. (1938) 267, we had occasion to consider the validity of an ordinance of Fall River the main portion of which, exclusive of a proviso at the end, was substantially the same as the ordinance here involved. We there held that the ordinance, considered apart from the proviso, was valid. On page 271 we said, "The distribution of handbills or similar papers in streets tends to annoy travelers and abutters, to obstruct the streets, and to litter them with paper. It seems to us a valid exercise of the power to main-

tain the 'internal police' of a city, to prohibit such distribution entirely." Many cases were cited in support of that statement. Although there are cases to the contrary, we felt and we still feel that the cases cited represent the sounder view. Reference to the original papers in the Kimball case shows that the same contention was argued there that is argued here. That case is a precedent upon the issue here presented. Ordinarily we would regard such a precedent as decisive and would forbear further discussion. But it is pressed upon us that the case of Lovell v. Griffin, 303 U. S. 444, decided a few weeks after the Kimball case was decided, is inconsistent with that case, and it therefore becomes our duty to consider whether we are now required to modify our views.

Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired. This principle is fully recognzed in recent decisons of the Supreme Court of the United States. Gitlow v. New York, 268 U. S. 652, 666, 667. Whitney v. California, 274 U. S. 357, 371. Stromberg v. California, 283 U. S. 359, 368. Near v. Minnesota, [fol. 73] 283 U. S. 697, 707, 708. DeJonge v. Oregon, 299 U. S. 353, 364. See Commonwealth v. Blanding, 3 Pick. 304, 313; Commonwealth v. Libbey, 216 Mass. 356; Commonwealth v. Karvonen, 219 Mass. 30; Commonwealth v. Anderson, 272 Mass. 100, 106. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago, Burlington & Quincy Railroad v. McGuire, 219 U. S. 549, 567. The question before us is whether we can properly say that the ordinance is not a reasonable regulation of the use of the streets affecting only incidentally one method of distribuing printed matter, but that it is an actual impairment of the constitutional freedom of the press. We are justified in overriding the judgment of the city's legislative body only if its action is clearly beyond the scope of its power. Commonwealth v. Mulhall, 162 Mass. 496, 498.

The wording of the section of the ordinance as a whole indicates that it was directed to the object of preventing the

accumulation of litter and rubbish in the streets and preserving the comfort and preventing the annoyance of travellers, and that it was not directed against the liberty of the press. Properly construed, we see no reason why in practical operation it should extend beyond the legitimate purpose for which it was designed. It does not prevent the casual passing of papers from one traveller to another in isolated instances. See Commonwealth v. Ellis, 158 Mass. 555. It forbids persons to "distribute". This implies an offering to many people, with the consequent probability of littering the neighborhood with papers which, if not painstakingly gathered by someone, will become unsightly, annoying and obnoxious. We think that the word "distribute," in connection with the other language used and in view of the apparent object of the section, does not include [fol. 74] sale, and that the ordinance does not forbid the sale of newspapers or other printed matter in the streets. The section is not in any sense directed toward the suppression of idea, theories or opinions. It involves no censorship. It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private.

In Commonwealth v. Morrison, 197 Mass. 199, at page 204, this court said, "The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose." Opinion of the Justices, Mass. Adv. Sh. (1937) 615, 617. The constitutional right of free speech cannot be so exercised as to obstruct the public in the enjoyment of its easement of travel. Commonwealth v. Surridge, 265 Mass. 425. See Commonwealth v. Davis, 140 Mass. 485; Commonwealth v. Abrahams, 156 Mass. 57; Commonwealth v. Davis, 162 Mass. 510, affirmed, Davis v. Massachusetts, 167 U. S. 43. The constitutional right to freedom of religious worship does not prevent the enforcement of reasonable rules and regulations for the use of streets and public places. Commonwealth v. Plaisted, 148 Mass. 375. The preservation of the public right of travel in the streets against annoyances of any kind has always been a proper subject of legislative action. Commonwealth v. Fox, 218 Mass. 498. Opinion of the Justices, 251 Mass. 569, 595.

Commonwealth v. Boston & Maine Transportation Co., 282 Mass. 345, 348. General Outdoor Advertising Co. Inc. v. Department of Public Works, 289 Mass. 149, 181.

In our opinion this case is to be distinguished from Lovell [fol. 75] v. Griffin, 303 U. S. 444, upon which the defendants principally rely. The ordinance which was there struck down was not a regulation of the use of the streets. It was an absolute prohibition of the distribution of "literature of any kind" anywhere within the city, whether delivered free or sold, without the written permission of the city manager. The city manager was thus made the sole arbiter, apparently without appeal, as to what literature of any kind should be allowed within the city. Plainly such an ordinance goes far beyond reasonable regulation and infringes upon fundamental rights. The court said of that ordinance, "It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestatio of the inhabitants, or the misuse or littering of the streets." 303 U. S. at page 451.

We hold that the section of the ordinances of Worcester here involved is not a denial or impairment of the freedom of the press, but that it is a reasonable and valid regulation of the use of the public ways for the preservation of public order, the protection of travellers from annoyance, and the prevention of misuse or littering of the streets, and that it affects the right of publication only collaterally and incidentally by curbing what the city may regard as abuses detrimental to the public in the manner of the exercise of that right. Commonwealth v. McCafferty, 145 Mass. 384. Commonwealth v. Haffer, 279 Mass. 73. Commonwealth v. Kimball, Mass. Adv. Sh. (1938) 267. Our opinion is fully supported by well reasoned decisions of the courts of last resort of Nebraska and of Wisconsin in closely parallel cases. In re Anderson, 69 Neb. 686. Milwaukee v. Kassen, 203 Wis. 383. Whether the legitimate objects of [fols. 76-77] the section could be substantially accomplished by less sweeping provisions is a matter for the consideration of the city's legislative body and not for us.

It follows that the complaints duly charged a criminal offence, and that there was no error in denying the motions to quash and dismiss them.

In each case the entry will be
Exceptions overruled.

Reporter's certificate to foregoing paper omitted in printing.

[fols. 78-79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] Judge's certificate to clerk omitted in printing.

[fol. 81] Clerk's certificate to judge omitted in printing.

[fol. 82] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed April 6, 1939

Appellants intend to rely upon the following points and, in support thereof, state that they believe that the entire record is necessary for the consideration thereof:

1. The ordinance under which appellants were convicted (Ordinance of the City of Worcester, Chapter 36, Section 12) is unconstitutional on its face in that said ordinance violates appellants' rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by denying them freedom of speech and freedom of the press.

[fol. 83] 2. The ordinance under which appellants were convicted (Ordinance of the City of Worcester, Chapter 36, Section 12) is unconstitutional as applied to appellants in that said ordinance denies appellants due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, March —, 1939.

Osmond K. Fraenkel, Sydney S. Grant, Samuel E. Angoff, Attorneys for Appellants. Of Counsel:

— —.

Mar. 10, 1939.

Service acknowledged this tenth day of March, 1939.
Alfred B. Cenedella, Assistant District Attorney,
175 Congress St., Milford, Mass.

[fol. 84] [File endorsement omitted.]

Endorsed on cover: File No. 43,334. Massachusetts, Superior Court, County of Worcester. Term No. 849. Elmira Nichols and Pauline Thompson, Appellants, vs. Commonwealth of Massachusetts. Filed April 6, 1939. Term No. 849, O. T., 1938.